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Draft report

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Addendum

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Annex I

Informal summary of the discussions of the Working Group on the report of the Group of Legal Experts, prepared by the Chairperson

A. Informal summary of discussions at the first meeting of the Working Group

Aspects relating to cooperation

1. At its first meeting, on 7 April 2008, the Working Group proceeded to the discussion issues concerning international cooperation on the basis of the general and specific issues identified in paragraph 9 of the main part of the present report, above.

2. Delegations were of the view that cooperation in criminal proceedings brought against United Nations officials and experts on mission was crucial, with some delegations highlighting the legislative and other arrangements available in their jurisdictions to facilitate such cooperation. It was suggested that consular and diplomatic missions in the host State could play an important role in the realization of such cooperation, in particular with respect to communication between the United Nations and Member States. While the need to respect State sovereignty was emphasized, attention was drawn to the existing legal instruments relating, inter alia, to human rights guarantees and to the protection of the victims. Reference was also made to the mandates conferred by the Security Council, which included aspects relating to the rule of law.

3. It was observed by some delegations that cooperation by means of ad hoc arrangements entailed certain problems. In particular, it was noted that cooperation in criminal proceedings normally required the existence of a legal basis such as a treaty. It was also observed that the conclusion of an ad hoc arrangement might require a certain period of time, and that delays occasioned thereby might jeopardize the integrity of the evidence. The view was expressed that some of those problems might be resolved by the adoption of a multilateral convention. It was also suggested that a convention could be useful for enhancing cooperation between Member States and the United Nations.

4. The need for timely notification of allegations to the Office of Internal Oversight Services (OIOS) and the relevant national authorities was emphasized by some delegations. The point was made that allegations of misconduct that might constitute a crime should be notified simultaneously to OIOS and to the authorities of the host State. The issue was also raised regarding the need to open clear channels through which a host State that believes that a United Nations official or expert on mission has committed a crime could interact with the Secretariat to obtain relevant information. It was stated that the United Nations had an important responsibility of informing victims of the various channels — both within the United Nations system and before national authorities — available to them for reporting allegations of criminal conduct by United Nations officials and experts on mission. The importance of creating a safe environment for the victims was emphasized, and reference was made in this context to the comprehensive strategy on assistance and support to victims of sexual exploitation and abuse by United

Nations staff and related personnel, of December 2007. Furthermore, attention was drawn to the problems that might arise in assessing the credibility of an allegation.

5. The importance of having independent and professional investigations, in particular by the United Nations, was underscored. Delegations were of the view that cooperation in the conduct of investigations was essential, in particular in order to secure the evidence and to preserve its integrity. Some delegations stressed the importance of finding ways and means to assist the host State in the conduct of criminal investigations and to ensure, as appropriate, the right of other States to have access to the *locus delicti* for investigatory purposes. According to one point of view, priority should be given to the host State for conducting criminal investigations, although the State of nationality should be kept informed of the proceedings. According to another view, while the host State had an important role to play in collecting the evidence, priority should be given to the jurisdiction of the State of nationality of the alleged offender in view of the international status of the individuals involved and of the need to preserve their due process rights. It was emphasized that on-site investigations by other States were subject to the consent of the host State.

6. The need to enhance the capacity of OIOS to conduct administrative investigations was underlined by several delegations. The need for coordination and uniformity within the United Nations in the conduct of investigations was also stressed. Several delegations were of the view that some of the evidence gathered by the United Nations as a result of an administrative investigation might be relevant in future criminal proceedings; there was therefore a need to develop procedures, including, as appropriate, through legislative changes, that would facilitate the use of such evidence in criminal proceedings. However, it was also observed that criminal and administrative investigations were different in nature, in particular as regards the methods used and the requirements concerning the burden of proof. Reference was made to the legal obstacles that States may encounter as regards the use in criminal proceedings of evidence collected by the United Nations. It was proposed that a recommendation be made to the effect that OIOS should contact as quickly as possible the State of nationality of the alleged offender as well as, when necessary, the host State, in order for the State concerned to commence appropriate criminal investigations. In this context, a parallel was drawn to the recent amendments introduced to the model memorandum of understanding as regards investigations in respect of crimes allegedly committed by members of national contingents in peacekeeping operations. The issue of confidentiality of information detained by the United Nations was raised, as well as the necessity of guaranteeing due process rights.

7. While it was observed that a discussion on extradition would be premature, since it was closely linked to the question of jurisdiction, the elaboration of a model clause to be included in extradition treaties was also suggested.

8. Support was expressed for the use of various categories of experts, which should not be limited to military lawyers but should include all available actors, including lawyers from the private sector as well as bar associations and representatives of civil society. It was proposed that focal points be established in order to allow victims to contact relevant experts.

Other aspects

9. Some delegations expressed support for covering a wide-scope *ratione personae* and *ratione materiae*. The view was expressed that the latter should include not only crimes related to sexual exploitation and abuse, but also crimes against the life, security or integrity of the person, as well as other crimes such as corruption, embezzlement or crimes against the security of transit. The precise definition of the crimes, as well as the punishment that they entailed, could be addressed in extradition treaties.

10. It was reiterated that the situation of a United Nations official or expert on mission who committed a crime outside the territory of the host State should also be addressed.

B. Question-and-answer segment

11. During the discussions in the Working Group, several delegations expressed the wish for more information from the Secretariat, in particular in order to assist in assessing the existence or the extent of the jurisdictional gaps identified by the Group of Legal Experts, as well as the need for a convention to fill those potential gaps. In particular, information was requested on a number of issues, including (a) the challenges and difficulties encountered in dealing with allegations of criminal conduct committed by United Nations officials or experts on mission; (b) an update on developments that had occurred since the issuance of the report of the Group of Legal Experts; (c) the present capacity of OIOS to conduct administrative investigations, including the preservation of evidence; (d) the location in which investigations were carried out and the probable timelines for the conduct of such investigations at the *locus delicti*; (e) the transfer of cases to national jurisdictions, in particular with regard to which jurisdiction was usually contacted by the United Nations; (f) the nature of the existing interaction between the United Nations and Member States; (g) whether ad hoc arrangements had proved satisfactory in establishing cooperation in criminal matters involving allegations of crimes committed by United Nations officials and experts on mission; (h) issues relating to obtaining the consent of the host State in order to carry out on-site investigations; (i) disciplinary sanctions imposed on United Nations staff members who committed serious misconduct that could amount to a criminal offence; and (j) issues relating to the waiver of immunity and, in particular, the challenges related to capacity-building once immunity was waived. Accordingly, at the second meeting of the working group, on 8 April 2008, delegations had an opportunity to interact with representatives of OIOS and the Office of Legal Affairs, and to ask questions.

12. The representative of OIOS noted that its activities were determined by elements of mandate, functionality and capacity. OIOS essentially had powers to investigate possible misconduct of staff of the Organization, as well as possible misconduct by personnel of a national contingent of a troop-contributing country in cases concerning sexual exploitation and abuse. It did not have a mandate to conduct criminal investigations.

13. Since OIOS had no competence in intelligence-gathering, its investigations were based on information received from a variety of sources (individuals, civil society and the media, as well as leads during regular audits). Operationally, OIOS was not the primary point of contact: the Conduct and Discipline Unit of the

Department of Field Support was the first to receive a complaint. However, once OIOS received a complaint, it dealt with the matter with utmost priority, taking into account the seriousness of the allegations. Information received was typically analysed to make a preliminary assessment as to whether the matter at issue fell within the mandate of OIOS. While the relationship with staff was based on a specific mandate, the relationship with troop-contributing countries was strictly collaborative, and it was a collaborative function that had been readily accepted by such countries.

14. There was an outreach programme to facilitate reporting, particularly in respect of sexual exploitation and abuse complaints. For example, the Conduct and Discipline Unit and Office of the United Nations High Commissioner for Refugees (UNHCR) provided such outreach services in field missions and in refugee camps. There were also awareness programmes for the United Nations community regarding investigations.

15. Services rendered by OIOS were confidential, anonymous and inviolable. Provision was also made for dealing with possible retaliation, and attention was drawn to the role of the Ethics Office concerning questions of disclosure and whistle-blowing.

16. There was no witness protection programme as such. However, within some agencies, such as UNHCR, programmes were available for expedited relocation for refugees at risk, and there were also possibilities for staff to be reassigned to other responsibilities. Security issues were dealt with by the security services of the Organization in cooperation with local authorities.

17. In view of its mandate, OIOS did not use standards of criminal law to characterize investigations of misconduct falling within its competence. However, generally, any form of criminal conduct would also constitute misconduct for purposes of administrative action.

18. Although the standards used were not those for criminal investigations, best-practices standard techniques were employed for collecting evidence, such as ensuring chain of custody, consideration of forensic issues, disk imaging for internal use in disciplinary action and DNA sampling for paternity. While the techniques employed might indeed be consistent with techniques of national authorities, given that OIOS was not an agent of a national authority (with sovereign authority), questions regarding the veracity of evidence, its admissibility, the standard of proof and conclusiveness could arise in the jurisdiction in which the information generated was to be used. However, such constraints did not pose particular problems for OIOS in the execution of its mandate in investigations to support a potential internal disciplinary action.

19. OIOS was not in a position to evaluate whether a violation of local law had taken place other than in the context of executing an administrative investigation. It did not have a mandate to make such an evaluative criminal assessment, which would also be impractical.

20. OIOS was currently undergoing reforms that were the subject of consideration by relevant legislative bodies. The report of the Group of Legal Experts was one among several reports considered by OIOS in designing its current reform

proposals.[a] Any envisaged role of OIOS in conducting criminal investigations would require a mandate change.

21. OIOS was also updating its standard operating procedures. The updated procedures were expected to be launched on 1 July 2008, to coincide with the effective date of the anticipated OIOS reforms. The Manual of Investigation Practices and Procedures had new investigative protocols and an integrated learning programme to facilitate on-site training. The Manual was a matter of public record; the standard operating procedures were not confidential but would not be made public.

22. Statements relating to investigations were not made under oath. Changes had been introduced for recording testimony, now in the form of a question-and-answer deposition signed by the staff member. For staff members, the duty to cooperate, tell the truth and maintain confidentiality, as well as the possible consequences of a failure to make an accurate and truthful statement, provided guarantees of adequate cooperation with an investigation. Staff members risked summary dismissal or suspension for misconduct.

23. OIOS made efforts to issue a report concerning an investigation before a staff member was separated from the Organization. Such a report became part and parcel of the personal file of an individual and could bear on future employment prospects within the Organization or its funds and programmes.

24. When an administrative investigation revealed the possibility that a crime might have been committed, OIOS provided the necessary information to management for decision-making. Additional care was taken to meet higher standards operationally. OIOS would make recommendations that were appropriate in accordance with its role in carrying out an administrative investigation for purposes of internal disciplinary action. Local criminal law could be used to evaluate whether a criminal offence might have been committed without making a determination of which jurisdiction would be appropriate for the consideration of a particular matter.

25. Particularly in circumstances where a violent crime was involved, the Office of Legal Affairs would serve as the first point of contact to ensure consistency and compatibility with the obligations under the 1946 Convention on the Privileges and Immunities of the United Nations.

26. In carrying out its functions, OIOS also collaborated operationally with local law enforcement, which usually had a significant head start in conducting an investigation concerning particular conduct. This role was distinct from law enforcement but complementary. Following prior consultations with the Office of Legal Affairs, OIOS might act as a point of reference for contact with local law enforcement in matters relating to operational aspects of an investigation.

27. The regular annual reports of OIOS to the General Assembly provided updates on statistical data.

28. The representatives of the Office of Legal Affairs stated that the Office provided central legal services to the Organization and its funds and programmes. Ordinarily, official requests from Member States for further information or requests

[a] See A/62/582 and Corr.1.

for access to witnesses were transmitted through the Permanent Missions. Issues of confidentiality were duly taken into account by the Organization in making a determination on a request for information. Once a decision was made by the Office of the Secretary-General, it was likewise transmitted through Permanent Missions.

29. In matters concerning outside investigations of a criminal nature involving the Organization or its staff, the Office of the Secretary-General consulted with the relevant substantive department and the Office of Legal Affairs. The Office of Legal Affairs proffered advice on the relevancy of jurisdiction, which was primarily that of the State in which the crime had been committed. In view of the provisions of resolution 62/63, there would be an established process for notification to the State of nationality.

30. In practice, the Organization instead of invoking provisions for the waiver of immunity at the outset, elected to cooperate voluntarily in relation to an investigation. Documents were provided on a voluntary basis without prejudice to the possible invocation of immunity.

31. The transfer of a case to a national jurisdiction for purposes of criminal proceedings was considered on a case-by-case basis in the context of the 1946 Convention. Situations of waiver at the earlier stages of an investigation tended to arise often when the staff member was required as a witness in criminal proceedings. In making determinations on waiver, the main considerations revolved around safeguarding the interests of the Organization and the impact of waiver or lack thereof in the administration of justice. Once immunity had been waived, the Secretariat was generally not provided information regarding difficulties, including evidentiary issues, that might arise in criminal proceedings instituted before national jurisdictions. Except in situations in which the Organization had an executive mandate to assist national judicial institutions, it had no legal capacity to provide support to State authorities in the exercise of criminal jurisdiction.

32. When an individual separated from Organization, the immunity *ratione materiae* continued to subsist and could be invoked by the Organization.

33. Not many problems were encountered in terms of cooperation with national authorities, although sometimes it was difficult to comply with the judicial calendar of a local jurisdiction because of the need to facilitate access to counsel. The retention of counsel might require compliance with United Nations procurement rules, a process that might take longer to complete. Such delays, however, had not been detrimental to the final outcome of the proceedings.

34. As there was no right to counsel for staff members, the provision of counsel by the Organization was discretionary and decided on a case-by-case basis. Often counsel was not needed since most of the waiver requests related to giving testimony (authentication of documents and providing background information) in cases that did not directly involve the Organization or its officials. Attention was also drawn to the administrative instruction on the reporting of arrest or detention of staff members or other agents of the United Nations and members of their families (ST/AI/299).

35. Under the Staff Regulations and Rules, staff members were amenable to administrative and disciplinary action for misconduct. This could include summary dismissal or suspension with or without pay. Unlike staff members, experts on

mission were not subject to Staff Regulations and Rules; accordingly, they were not easily amenable to administrative sanction.

C. Consideration of the informal working paper on international cooperation, prepared by the Chairperson for the consideration of the Working Group

36. Following consultation with the Working Group, the Chairperson presented an informal working paper on international cooperation, at the third meeting of the Working Group, held on 8 April 2008. A revised version of the working paper (see annex II.A below) was subsequently circulated at the fourth meeting of the Working Group, held on 9 April 2008. It was explained that the paper, which was based on the recommendations developed by the Group of Legal Experts,[b] contained suggested general policy directions that could help advance the Working Group's work in addressing issues of international cooperation, and was not a final document, nor to be considered binding on States. It was further clarified that the intention was to cover all possible types of situations that could arise in practice. A preliminary discussion of the two versions of the informal working paper was held at the third and fourth meetings of the Working Group. A delegation noted that the various provisions reflected the basic ideas set out in General Assembly resolution 62/63. It was also pointed out that the General Assembly, on the recommendation of the Fifth Committee, had adopted resolution 62/247, paragraph 19 of which was related to the work of the Ad Hoc Committee.

37. Some delegations noted that the informal paper contained elements that did not conform with existing national legislation, or involved political considerations (such as issues relating to the transfer of prisoners) and, accordingly, required further reflection and discussion. It was also observed that account needed to be taken of the mandate of the Ad Hoc Committee, and that further consideration of the scope of the topic (including whether military observers serving as United Nations experts on mission were included or not) was needed in order to more fully appreciate the implications of the policy directives in the informal paper. A delegation expressed the view that the paper could have been recast in the form of a list of existing problems, as opposed to suggestions. It was further pointed out by some delegations that the reference in several paragraphs to there being "a need" for States to act did not seem borne out by the discussions in the Ad Hoc Committee, including by the presentations of the Secretariat. It was recommended that further information be provided as to the necessity of States acting on the measures contemplated in the informal working paper.

38. Several delegations expressed support for a refinement in the revised version of the informal paper so as to include more explicit reference to cooperation between States and the United Nations. It was also suggested that more specific reference be made to national legislation. A delegation noted that part of the difficulty was that the Secretariat did not currently share information about possible criminal actions of United Nations officials or experts on mission with the host State or State of nationality as soon as it became aware of such conduct. Accordingly, in cases of suspected criminal conduct, the emphasis should be placed less on internal

[b] See A/60/980.

administrative investigations and more on sharing information with States with a view to undertaking a criminal investigation and prosecution, if applicable. It was further suggested that greater reference could be made, throughout various paragraphs, to the rights of individuals in criminal proceedings, including in the context of the transfer of prisoners and the serving of sentences.

39. Several delegations requested more time to reflect on the provisions of the informal paper and to consult their capitals.